Supreme Court, U.S.
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No. 99-

IN THE

# Supreme Court of the United States

ELECTRONIC DATA SYSTEMS and DAVID WIRE,

*Petitioners,*

*v.*

STEPHEN A. SPOSATO, Administrator,
Estate of JODY JONES SPOSATO,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In a wrongful discharge action where the published opinion of the Ninth Circuit Court of Appeals creates an inter-circuit conflict on an issue of national significance to all employees, should the employer's liability for the lost fringe benefit of life insurance be limited to the cost of the premiums necessary to continue the life insurance policy where the former employee purchases substitute insurance and later dies during the back pay period?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

***Petitioners*:**

Petitioner Electronic Data Systems Corporation ("EDS") does not have a parent company, and no publicly held company owns 10% or more of its stock.

David Wire is a former managerial employee of EDS.

***Respondent*:**

Jody Jones Sposato, a former employee of EDS, died on July 1, 1993 while discovery in this case was ongoing. Stephan A. Sposato, as Administrator of the Estate of Jody Jones Sposato, thereafter substituted in as the real party in interest.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Opinion by Judge Alfred T. Goodwin; Dissent by Judge Edward Leavy) is published at 188 F.3d 1146 (9th Cir. 1999) and is included in the Appendix at A.

The opinion of the United States District Court for the Northern District of California (Judge Eugene F. Lynch) granting the motion of EDS and David Wire for summary judgment dated October 10, 1995 is included in the Appendix at D. In an initial appeal, the United States Court of Appeals for the Ninth Circuit remanded the action to the District Court to resolve an issue of fact; this opinion is included in the Appendix at C. The United States District Court for the Northern District of California (Judge Samuel Conti) again granted the motion of EDS and David Wire for summary judgment on July 23, 1998; this opinion is included in the Appendix at B. A second appeal resulted in the opinion at Appendix A which is the subject of this Petition.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit ("Court of Appeals") issued its Opinion on August 26, 1999. The Court of Appeals denied a timely Petition for Rehearing and Petition for Rehearing *En Banc* on October 7, 1999 (Appendix E). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Ms. Sposato's original lawsuit was brought for an alleged violation of California's Fair Employment and Housing Act, Government Code §§ 12900, *et seq.*, construed in accordance with Title VII, 42 U.S.C. § 2000e (alleged discrimination in employment on the basis of sex).

California's survival statute, Code of Civil Procedure § 377.34, provides:

> In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

## STATEMENT OF THE CASE

### A. Statement of the Issue

The sole issue here is whether Petitioners EDS and David Wire (collectively "Petitioners" or "EDS") owe Mr. Sposato — as an element of damages in his wife's wrongful termination case — the "face value" of a life insurance policy purchased by EDS for Ms. Sposato as a fringe benefit to her employment. The Ninth Circuit's decision in this case, holding EDS liable to Mr. Sposato for the entire "proceeds" of the life insurance policy and not the cost of the premiums

required to purchase substitute insurance, is in direct conflict with the result and reasoning of the Fourth Circuit's seminal decision in *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985), as well as every federal court that has addressed this issue, including both district court judges who each decided this issue in Petitioners' favor below. Moreover, as noted by the dissent, the Ninth Circuit's majority opinion makes "bad public policy" that could affect hundreds of thousands of workers throughout the Ninth Circuit, whose employers now "may well cease to offer group life insurance as a benefit of employment" lest these employers find themselves "transform[ed] . . . into a life insurer." *Sposato v. Electronic Data Systems, Corp.*, 188 F.3d 1146, 1150 (9th Cir. 1999) (Leavy, J., dissenting)

## B. Factual and Procedural Background

EDS employed Jody Jones Sposato from November 1990 until her resignation on February 18, 1992. Ms. Sposato filed this action for alleged sex discrimination on August 31, 1992. Petitioners subsequently removed the action to federal district court on diversity grounds. On July 1, 1993, while discovery in this case was ongoing, Ms. Sposato died accidentally. Thereafter, Stephen A. Sposato, as Administrator of the Estate of Jody Jones Sposato, substituted in as Plaintiff.

### 1. The Life Insurance Policy

During Ms. Sposato's employment she was covered by a group life insurance policy which insured her life during her employment in an amount twice what she earned in base salary and bonuses. The policy was a "double indemnity" policy, in which the insurer pays out twice the face value of the policy if the insured dies accidentally. The face value of

Ms. Sposato's policy was $150,000, and $300,000 if her death were accidental. EDS paid premiums of $360 per year for this coverage.

Following her separation from EDS, Ms. Sposato purchased substitute life insurance with a face value of $150,000; the cost to her of the policy was $207 per year. This policy was not, however, a double indemnity policy (which she could have purchased for an additional $103.50/ year).

Following Ms. Sposato's accidental death, the insurance company paid Mr. Sposato the $150,000 face value of Ms. Sposato's life insurance policy.

**2. The Settlement**

In July 1994, the parties entered into a Settlement Agreement and Release, with the assistance of Judge Norman Spellberg, disposing of all the issues in this case except one:

> [T]he sole issue remaining to be adjudicated in the Action will be the issue of whether the proper measure of the value of the life insurance benefit is the cost of the premium or a sum equal to the proceeds of the EDS insurance policy that would have been in effect had Ms. Sposato died in an accident while employed by EDS ("the Life Insurance Issue").

### 3. The District Courts' Decisions

Pursuant to the Release, the parties submitted the Life Insurance Issue to the district court for resolution on cross-motions for summary judgment. By Order of October 10, 1995, Judge Eugene F. Lynch granted EDS' motion, finding as a matter of law that the correct measure of the life insurance benefit is indeed the premiums.

Mr. Sposato appealed, and the Ninth Circuit remanded — not because it disagreed with Judge Lynch's conclusion as a matter of law, but finding that there was an issue of fact as to the duration of the back pay period. The parties jointly petitioned for rehearing, explaining that the duration of the back pay period was not material to disposition of the Life Insurance Issue, but the Ninth Circuit denied the Joint Petition.

On remand, the parties addressed the Ninth Circuit's concerns by stipulating to the length of the back pay period and that the life insurance policy at issue would have been in effect at the time of Ms. Sposato's death, had she remained in the employ of EDS. The parties again filed cross motions for summary judgment, and on July 23, 1998, Judge Samuel Conti granted summary judgment for EDS, adopting Judge Lynch's reasoning in ruling that the proper measure of damages is the cost of the premiums paid to purchase insurance, and not the face value of the life insurance policy.

### 4. The Ninth Circuit Decision

On August 26, 1999, the Court of Appeals (with Judge Leavy dissenting) reversed the judgment of the District Court, holding that EDS is liable for the "face value" of the

employer-provided double indemnity life insurance policy ($300,000), less the proceeds Ms. Sposato received under the substitute policy Ms. Sposato purchased ($150,000). *Sposato v. Electronic Data Systems, Corp.*, 188 F.3d 1146, 1147 (9th Cir. 1999). The Court of Appeals reached this result despite the fact that every other federal court that has addressed this issue has reached the opposite conclusion.

The Ninth Circuit on October 7, 1999 denied Petitioners' timely request for rehearing and for *en banc* review.

## REASONS FOR GRANTING THE WRIT

### I.

### THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DIRECTLY CONFLICTS WITH THE OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS AND WITH EVERY OTHER FEDERAL COURT TO DECIDE THIS ISSUE.

The Ninth Circuit's opinion in *Sposato v. Electronic Data Systems, Corp.*, 188 F.3d 1146 (9th Cir. 1999) holds in effect that when an employer offers life insurance as an employment benefit, that employer becomes a guarantor of payment for the full amount of the proceeds of that life insurance policy when a terminated employee dies. This holding, ***which is contrary to every other federal court to decide this issue,*** creates a direct inter-circuit conflict on an issue of national significance to workers everywhere. The message of the Court of Appeals to employers in the Ninth Circuit is clear — do ***not*** provide life insurance coverage as a fringe benefit to your employees. (Leavy, J., dissenting: "As a result of our holding, prudent employers may well

cease to offer group life insurance as a benefit of employment." *Sposato*, 188 F.3d at 1150)

Throughout the nation, courts have recognized that the proper measure of damages under the circumstances of cases such as this one is the cost of purchasing life insurance, namely the policy premiums (here $360), and ***not*** the "face value" of the employer-purchased policy (here $300,000 less the $150,000 Ms. Sposato mitigated). The leading case on this issue is the Fourth Circuit Court of Appeal's decision in *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985). Many courts have followed *Fariss* and applied its holding to their own facts, and, until now, no court has disagreed with it.[1]

---

1. The following courts have followed *Fariss*: *Shkolnik v. Combustion Engineering, Inc.*, 856 F. Supp. 82 (D. Conn. 1994); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276 (E.D. Tenn. 1990); *Munnelly v. Memorial Sloan Kettering Cancer Center*, 741 F. Supp. 60 (S.D.N.Y. 1990); *Cooper v. Cobe Laboratories*, 743 F. Supp. 1422 (D. Col. 1990); *Buckley v. Reynolds Metals Co.*, 690 F. Supp. 211 (S.D.N.Y. 1988); *Bonura v. Chase Manhattan Bank, N.A.*, 629 F. Supp. 353 (S.D.N.Y. 1986), *aff'd on other grounds*, 795 F.2d 276 (2d Cir. 1986); *Worsowicz v. Nashua Corp.*, 612 F. Supp. 310 (D.C.N.H. 1985).

The *Fariss* court noted that it did not need to "consider the measure of damages had [plaintiff] earnestly attempted to procure substitute individual coverage and found insurance unavailable for a person of his age and health." 769 F.2d at 966. Similarly in this case, the Court need not consider the measure of damages in a situation where a plaintiff attempts to mitigate but is unable to do so. In this case, Ms. Sposato did purchase substitute insurance. Indeed, it has been stipulated pursuant to arbitration that Ms. Sposato fully mitigated her damages. Accordingly, the limited exception to the *Fariss* rule set forth in *Foster v. Excelsior Springs City Hospital and Convalescent Center*, 631 F. Supp. 174 (W.D. Mo. 1986) (awarding proceeds as damages when plaintiff attempted to mitigate but was unable to do so), does not apply in this case.

In *Fariss*, the original plaintiff filed a lawsuit against his former employer alleging he was unlawfully terminated because of his age. When plaintiff died, his wife, the administratrix of his estate, substituted into the case as plaintiff. In her capacity as the substitute plaintiff, the wife contended she was entitled to receive as an element of damages for the age discrimination claim the face amount of the $42,000 life insurance policy the company paid for as a fringe benefit to her husband during his employment.

The Fourth Circuit acknowledged that a claim for lost fringe benefits survives the death of an employee, and that employers guilty of discrimination are liable for fringe benefits they would have provided to employees as well as back wages. *Id.* at 964. The value of life insurance provided by the employer thus is a recoverable element of damages. However, the court rejected the plaintiff's claim of entitlement to the face value of the insurance policy on public policy grounds, *inter alia*:

> The question, of course, concerns the proper measure of value. ***We reject plaintiff's contention that the proceeds of the insurance are the appropriate measure of value here. Typically, as in this case, the insurance proceeds are paid not by the employer but by a third party insurer with whom the employer contracts***. By electing this method of protecting its employees, ***the employer manifests an intent to limit its expenditures to definite and regular premiums***, which ordinarily provide the basis for a damages calculation . . . .
>
> ***We do not think Congress intended, as a general rule, to transform employers into insurers***

> ***merely because an insurance policy is part of the compensation for employment***. Although the insurance policy is the benefit an employee contracts to receive, the employer does not undertake to cover personally risks of loss of life or illness by purchasing a policy for employees. . . .
>
> In many instances, an obligation to pay the full proceeds of a life or health insurance policy could be staggering, amounting to many hundreds of thousands of dollars. ***The disincentives to providing employees insurance as a fringe benefit are evident; faced with such enormous potential liability, employers could be expected to consider compensating employees entirely in cash***. . . .
>
> The insurance coverage, not the proceeds, is the benefit for which the employer must be held liable. Here the employer would ***in no event*** have been liable to the employee for the $42,000, but only for continuing payment of premiums. ***The value of being insured for a given period is precisely the amount of the premiums paid***. To require the employer to pay the face value of the policy would be to compel assumption of a risk not undertaken on behalf of any other employee.

*Id.* at 965 (emphasis added).

As *Fariss* explains, the discharge of an employee, even if wrongful, does not somehow transform the employer into an insurer. If it did, no prudent company would provide its

employees with insurance benefits, a result that would be to the detriment of every employee presently covered by an employer's group life insurance plan. The *Fariss* court is exactly right. Faced with such enormous potential liability, employers would be foolish to continue offering group life insurance as a benefit of employment.

The Court of Appeals, ignoring the cases following *Fariss* and without consideration of the public policy rationale upon which the *Fariss* decision is based, purported to distinguish *Fariss* from this case with the following solitary sentence: "We believe that *Fariss* is inapposite here because, while the complainant in *Fariss* chose not to self-insure after his termination, the parties have stipulated in this case, pursuant to arbitration, that Ms. Sposato mitigated her damages fully by obtaining substitute life insurance." *Sposato*, 188 F.3d at 1148.

However, the Court of Appeals unquestionably misreads the *Fariss* decision. *Fariss* could not be clearer that Mr. Fariss' failure to purchase substitute insurance had nothing to do with whether Ms. Fariss was entitled to recover the full proceeds of the employer-provided life insurance policy: "Here the employer would ***in no event*** have been liable to the employee for the $42,000 [life insurance proceeds], ***but only for the continuing payment of premiums***." *Fariss*, 769 F.2d at 965 (emphasis added). The *Fariss* court's "in no event" language is unambiguous; even if Mr. Fariss had mitigated his damages by purchasing substitute life insurance coverage, as Ms. Sposato did here, his wife would have only been entitled to recover the "continuing payment of premiums," and not the proceeds of the life insurance policy.

That the Ninth Circuit misreads *Fariss* is also clear from the following excerpt from *Fariss*. After it rejected the plaintiff's claim to the face value of the insurance policy, the *Fariss* court then went on to decide whether the plaintiff should be entitled to recover even the premiums the employer would have paid, given that no substitute insurance was purchased:

> An ADEA plaintiff has a general duty to mitigate his damages "by seeking other available employment with reasonable diligence." [Citations omitted] It is equally appropriate to require a plaintiff to purchase substitute insurance if he wishes to claim any damages for loss of coverage above the employer-paid premiums. [Citations omitted] This rule of mitigation both assures that he will recover the full cost of purchasing comparable insurance should he prevail on his substantive claim, and serves to reveal whether the employee actually desired insurance protection, thereby avoiding a windfall recovery. ***Because there [was] no evidence here that Mr. Fariss attempted to obtain any substitute coverage, plaintiff can recover only the premiums the employer would have paid.***

*Id.*, 769 F.2d at 966 (emphasis added).

Thus under *Fariss* the significance of the purchase of substitute insurance goes only to the amount of the ***premiums*** a plaintiff may recover; *i.e.,* if no substitute insurance has been purchased, the recovery is limited to the amount the employer would have paid, whereas if substitute insurance has been purchased, the plaintiff may recover the full amount

of the premiums actually paid (to the extent the purchase represents "comparable" coverage), even if the amount the terminated employee spent exceeds what the employer would have paid. Accordingly, the Ninth Circuit's failure to follow *Fariss* in this case because "the complainant in *Fariss* chose not to self-insure after his termination" while Ms. Sposato purchased substitute life insurance is a complete *non sequitor*.

A number of district courts have expressly followed *Fariss*, including *Worsowicz v. Nashua Corp.*, 612 F. Supp. 310 (D.C.N.H. 1985). As in *Fariss*, the plaintiff in *Worsowicz* died after he filed his lawsuit for discriminatory termination, and his surviving wife subsequently substituted in as the complaining party. The surviving wife sought to recover the full amount of the policy at the time of her former husband's termination. The court rejected her claim. *Id.* at 313.

The court reasoned that the plaintiff, as the administratrix, succeeded to the same rights her husband had under the Age Discrimination in Employment Act ("ADEA") since the cause of action under the ADEA survived his death. Therefore, "plaintiff's recovery under the ADEA is limited to the damages Anthony Worsowicz was entitled to receive as a victim of discrimination." *Id.* at 313. The court concluded "as a matter of law, that Anthony Worsowicz, and thus the present plaintiff, would only be entitled to recover the cost to [the employer] of providing the life insurance coverage." *Id.* In reaching this conclusion, the court relied on *Fariss* and on those authorities holding that the proper measure of damages in terms of fringe benefits is the amount paid by the employer ***in premiums***. *Id.* (*citing, e.g.*, 3 A. Larson and L. Larson, *Employment Discrimination*, § 103.41(b) (1984)).

Several other district courts have likewise followed *Fariss*. In *Bonura v. Chase Manhattan Bank, N.A.*, 629 F. Supp. 353, 360 (S.D.N.Y. 1986), one of the plaintiffs died while his discrimination action was pending. The court followed *Fariss* in holding not only that plaintiff was not entitled to the proceeds of the policy, but also that he was not entitled to the value of the premiums because he had failed to mitigate his damages. *See also Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276 (E.D. Tenn. 1990) (following *Fariss* in holding that the value of employee benefits is the premiums paid by the employer); *Munnelly v. Memorial Sloan Kettering Cancer Center*, 741 F. Supp. 60, 63 (S.D.N.Y. 1990) (adopting *Fariss* analysis and holding that a successful plaintiff "may recover for the cost of a life insurance package comparable to that which he received through his previous employer, even if he does not actually procure such comparable insurance, provided that he makes diligent efforts to do so."); *Cooper v. Cobe Laboratories*, 743 F. Supp. 1422, 1435 (D. Colo. 1990) (following *Fariss* in holding that plaintiff "is entitled to recover for the loss of her medical insurance benefits, with the measure of that loss based on the out-of-pocket expense to [plaintiff] for the continuing payment of premiums."); *Buckley v. Reynolds Metals Co.*, 690 F. Supp. 211, 219 (S.D.N.Y. 1988) (*citing Fariss* for the proposition that "[t]he measure of damages is the amount paid by the employer in premiums.").

## II.

## THE PETITION SHOULD BE GRANTED BECAUSE CALIFORNIA AND PRIOR NINTH CIRCUIT CASE LAW IS CONSISTENT WITH THE *FARISS* COURT'S CONCLUSION THAT THE PROPER MEASURE OF DAMAGES IS THE COST OF PURCHASING REPLACEMENT LIFE INSURANCE, NOT THE POLICY PROCEEDS.

While no California case has considered the specific issue raised by the facts of this case, the rule in *Fariss* is entirely consistent with the California Supreme Court's ruling in *Wise v. Southern Pacific Co.*, 1 Cal. 3d 600 (1970). In *Wise* the employer provided its employees with the benefit of a life insurance policy at no cost. At trial the plaintiff, a wrongfully discharged employee, offered proof it cost him $1,998.91 to replace the life insurance policy provided by the company. Consistent with *Fariss*, the California Supreme Court ruled the cost of the premiums paid by the plaintiff to purchase substitute insurance to be the proper measure of the lost life insurance benefit. *Id.* at 607-08.

*Fariss* is also consistent with prior case law in the Ninth Circuit, which considered the issue of valuing lost fringe benefits as part of a damages award in *Galindo v. Stoody*, 793 F.2d 1502, 1517 (9th Cir. 1986). In *Galindo*, the Ninth Circuit held the plaintiff's union had breached its duty of fair representation, thus entitling the plaintiff to recover lost wages and lost benefits caused by the union's wrongful acts. The union challenged the award of lost fringe benefits. The *Galindo* court explained "a damage award in a duty of fair representation suit should include those fringe benefits which the employee would have actually received had his or her

employment not been wrongfully terminated." *Id.* The *Galindo* court, in carefully chosen language, then explained how to value lost fringe benefits in such a case:

> Where an employee's fringe benefits include ***medical and life insurance***, a plaintiff should be compensated for the loss of those benefits if the plaintiff has purchased substitute insurance coverage or has incurred uninsured, out-of-pocket ***medical expenses*** for which he or she would have been reimbursed under the employer's insurance plan.

*Id.* (emphasis added).

Under *Galindo*, an employee who has suffered the loss of medical benefits can recover an award of lost benefits in two situations: (1) if the plaintiff has purchased substitute insurance coverage; or (2) if the plaintiff has incurred uninsured, out-of-pocket expenses for which s/he would have been reimbursed under the employer's insurance plan. However, employees who have suffered the loss of life insurance benefits can recover an award of lost benefits ***only*** if they purchased substitute life insurance coverage. As explained in the quotation cited above, the Ninth Circuit carefully avoids extending the second method of recovering lost medical insurance benefits to the lost life insurance benefits situation.

In footnote 15 of *Galindo*, the court indicated that its only disagreement with *Fariss* is that *Fariss* was ***too generous*** to the plaintiff. *Galindo* interprets *Fariss* to "indicate" that a plaintiff in an age discrimination case "might" recover the cost to the employer of providing life

insurance even where no substitute insurance is purchased by the plaintiff. The better rule, says *Galindo*, is to limit recovery of lost insurance benefits to those situations where the plaintiff proves s/he actually purchased substitute insurance.

While *Galindo* does not address the specific question before this Court, the carefully chosen language of *Galindo* strongly suggests that court would apply the traditional law of mitigation and follow the lead of *Fariss*. Like the court in *Fariss*, the court in *Galindo* found it appropriate to require the plaintiff to mitigate his lost insurance benefits by purchasing substitute insurance. Because the plaintiff offered no evidence he had purchased or attempted to purchase substitute insurance, the court of appeals remanded the case to the district court, ruling the district court erred in awarding lost benefits to the plaintiff in the absence of evidence he had "actually incurred expenses for substitute medical or life insurance coverage." *Id. Galindo* thus indicates the proper measure of damages for lost life insurance benefits is the cost to the plaintiff of purchasing substitute life insurance.

## III.

## THE PETITION SHOULD BE GRANTED BECAUSE CALIFORNIA'S SURVIVAL STATUTE PRECLUDES A DECEDENT'S REPRESENTATIVE FROM RECOVERING LIFE INSURANCE PROCEEDS AS DAMAGES BECAUSE THE PROCEEDS WERE NOT "SUSTAINED OR INCURRED BEFORE DEATH."

Even in the absence of the uniform body of federal case law holding that the proper measure of the value of employer-provided life insurance is the cost of the premiums, the Petition should be granted under California's survival statute, which precludes a decedent's representative from recovering life insurance proceeds as damages. California's survival statute, Code of Civil Procedure § 377.34, provides, in its entirety:

> In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are ***limited to the loss or damage that the decedent sustained or incurred before death***, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement. (emphasis added)

Clearly, § 377.34 applies to this action seeking damages suffered by Ms. Sposato and prosecuted by Mr. Sposato as administrator of Ms. Sposato's estate. Although Petitioners have found no California authority addressing the precise issue in this case, the plain language of the statute provides

the logically compelling answer, as recognized by Judge Leavy's dissenting Court of Appeals opinion. Damages based on loss of life insurance proceeds — as opposed to premiums — cannot possibly have been "sustained or incurred before death," as the statute requires. Thus, Ms. Sposato could not have recovered her life insurance proceeds as damages while she was still alive, and Mr. Sposato cannot recover the proceeds as her personal representative in proceeding on Ms. Sposato's cause of action. Instead, under § 377.34, Mr. Sposato is limited to the damages Ms. Sposato incurred before her death, namely, the cost of the premiums.

Some have argued that the statute contemplates physical injuries and suffering, and not contractual rights such as rights to life insurance. However, the statute contains no such limitation, and the case law refutes any such purported limitation.

Analytically, the statute is in three parts — it states a general proposition, and then sets forth two non-exhaustive lists of examples. The general proposition is: Recovery by a decedent's representative is limited to damages the decedent incurred before death.

The first list identifies ***examples*** of damages a decedent's representative could recover:

> . . . ***including*** any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived . . .

*Id.* (emphasis added).

The second list identifies ***examples*** of damages a decedent's representative could ***not*** recover:

> . . . ***do not include*** damages for pain, suffering, or disfigurement.

*Id.* (emphasis added).

"Contractual rights" is not specifically identified as either recoverable or not recoverable. Accordingly, the language of the general proposition governs whether a decedent's representative may recover the proceeds of a life insurance policy on the decedent's life. Since such proceeds ***by definition*** do not constitute a loss "that the decedent sustained or incurred ***before death***" (emphasis added), the recovery Mr. Sposato seeks here is precluded by § 377.34.

Moreover, existing case law contradicts any suggestion that the bar of § 377.34 applies only to "physical injuries and suffering" and not to economic damages such as lost employment benefits. *See Stevens v. Owens-Corning Fiberglass Corp.*, 49 Cal. App. 4th 1645, 1654 (1996) (noting that precluding recovery of future pension benefits "is consistent with the plain language of section 377.34" but declining to so rule because Defendant "invited error" by stipulating to instruction requiring jury to assess damages for lost pension benefits if Defendant found liable).[2]

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2. This Court should note that this reading of the statute does not, as Respondent might argue, preclude a personal representative from suing an insurer for breach of contract. Such an argument would again ignore the language of the statute. The effect of section 377.34 is limited to actions ". . . by a decedent's personal representative or successor in interest ***on the decedent's cause of action*** . . ." (Cont'd)

Thus, the survival statute constitutes an independently sufficient state law basis for granting the Petition.

## CONCLUSION

The Court of Appeals' decision in the case below both misapplies and contradicts the law, as set forth in the *Fariss* case, limiting the damages available to a wrongfully terminated employee for the loss of the fringe benefit of life insurance to the cost of the premiums to purchase such insurance. The Court of Appeals mistakenly reasoned that *Fariss* is "inapposite" to this case because the plaintiff there did not attempt to purchase substitute life insurance, whereas Ms. Sposato did purchase substitute life insurance. However, the *Fariss* court made it explicitly clear that the plaintiff in that case would be entitled to the proceeds of the life insurance policy "in no event." The linchpin of the *Fariss'* court's ruling was not the plaintiff's failure to obtain substitute insurance, but rather the compelling public policy reasons articulated in the *Fariss* opinion, reasons wholly ignored by the Court of Appeals in this case.

Accordingly, EDS respectfully requests that the petition for writ of certiorari be granted.

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(Cont'd)

(emphasis added). The statute by its terms does ***not*** apply to any action by a beneficiary of an insurance contract ***on his or her own behalf*** against an insurer for breach of contract. In contrast, the "contractual rights", if any, purportedly at stake in this case, are personal to the decedent vis-a-vis her former employer.

Respectfully submitted,

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